NOR-PAE

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

(1)

# No. 131

NORRISTOWN HERALD, INC.,

*Petitioner,*

*vs.*

GEORGE BAUSEWINE

## PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA AND BRIEF IN SUPPORT THEREOF.

WILLIAM F. QUINLAN,
JOHN J. O'CONNER,
*Counsel for Petitioner.*

# INDEX

## Subject Index


| | Page |
|---|---|
| Petition for a writ of certiorari | 1 |
| Jurisdiction | 2 |
| Summary statement of the matters involved | 2 |
| Federal questions | 8 |
| Opinions | 9 |
| Origin of federal questions | 9 |
| Brief in support of petition | 11 |
| Trial by jury in a libel case is a requisite of due process of law in Pennsylvania | 11 |
| Your petitioner was accorded the form but denied the substance of trial by jury | 12 |
| State Court denied petitioner's right of trial by jury for expressed reasons of expediency | 15 |
| The action of the State Court in substituting its judgment for that of a jury constitutes a post-publication judicial censorship in contravention of the First and Fourteenth Amendments | 15 |
| Appendix "A"—Opinion of Common Pleas Court after first trial | 19 |


## Table of Cases Cited


| | |
|---|---|
| *Atlas* v. *Fort Pitt Brewing Co.*, 83 P. L. J. 421 | 3,12 |
| *Bausewine* v. *Strassburger et al.*, 50 D. & C. 525 | 3,5,6 |
| *Bausewine* v. *Norristown Herald, Inc.*, 41 Atlantic 2nd 736 | 14 |
| *Chicago, Burlington R. R.* v. *Chicago*, 166 U. S. 226 | 13 |
| *Greer* v. *Reece*, 14 District Reporter 658 | 3 |
| *Inland Steel Company* v. *N. L. R. B.*, 109 Federal 2nd 9 | 14,15 |
| *Union Pacific R. R. Company* v. *Syas*, 246 Federal 561 | 14 |
| *Van Swartow* v. *Commonwealth*, 24 Pa. 131 | 12 |


## Statutes Cited


| | |
|---|---|
| Constitution of Pennsylvania: | |
| Article I, Section 6 | 6,7,11 |
| Article I, Section 7 | 7 |
| Constitution of the United States, 14th Amendment | 6,7 |
| Judicial Code, Section 237, as amended (28 U.S.C. 344b) | 2 |




152213

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

---

# No. 131

---

NORRISTOWN HERALD, INC.,

*Petitioner,*

*vs.*

GEORGE BAUSEWINE,

*Respondent*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA**

---

*To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Norristown Herald, Inc., defendant below, respectfully prays that Writs of Certiorari issue to review the judgments of the Supreme Court of Pennsylvania, which affirmed the judgments of the Common Pleas Court of Montgomery County, Pennsylvania, entered in favor of the plaintiff below, George Bausewine; said judgments having been entered in amounts totalling $12,500.00, upon verdicts totalling $50,000.00; remittiturs totalling $37,500.00 having been filed by the plaintiff below as an alternative to the grant of a new trial.

## Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended. (28 U. S. C. Section 344 (b).)

The decision of the Supreme Court of Pennsylvania was rendered March 19, 1945 (R. 545).

The Petition for a Re-hearing was denied April 12, 1945 (R. 561).

## Summary Statement of the Matters Involved

1. The petitioner, Norristown Herald, Inc., is a daily newspaper, published at Norristown, Montgomery County, Pennsylvania. Ralph Beaver Strassburger was, at the time of the publication of the editorial and articles hereinafter referred to, President of said corporation.

2. The respondent, George Bausewine, was at the time of the publication of the two editorials and three news articles (R. 15, 17, 19, 24, 25), and until his subsequent conviction upon the charge of receiving bribes, Chief of Police of the said Borough of Norristown.

3. Upon the publication of the two editorials (R. 15, 17) and the first of the news articles (R. 19), plaintiff below entered suit, alleging that he had been libelled by the publication of them. A second suit was subsequently entered upon the publication of the latter two news articles (R. 24, 25), plaintiff below alleging that he, again, had been libelled.

4. In each case defendant below filed answers, setting up the pleas of "not guilty," "truth," and "privilege."

5. The cases being at issue, were tried together, before the Honorable Harold B. Knight and a jury, which rendered verdicts, in favor of the plaintiff, as follows:

| | |
|---|---|
| In the first case (being Common Pleas No. 36) | |
| against Ralph Beaver Strassburger | $12,500.00 |
| Norristown Herald, Inc. | 25,000.00 |
| In the second case (being Common Pleas No. 83) | |
| against Ralph Beaver Strassburger | $12,500.00 |
| Norristown Herald, Inc. | 25,000.00 |

6. Motions for new trials were duly filed, and upon them new trials were granted. The Lower Court stated in its opinion (reported as *Bausewine* v. *Strassburger*, 50 D. & C., 525) (Appendix "A", 19, 22, 23):

> "The amounts of the verdicts alone, showed that the jury must have been swayed more by passion and prejudice than a desire to fairly compensate plaintiff for the injury done him, or to reasonably punish the defendants for their wrongdoing."
>
> "A verdict based on passion and prejudice should not be allowed to stand. *It cannot be cured by remittitur. Right and justice require that it should be set aside and the case tried again by an impartial jury.*" (Citing Atlas v. Fort Pitt Brewing Co. 83 P. L. J. 421) (Italics ours).
>
> "Why should a verdict in part be retained if the jury were really influenced by prejudice and passion is a pertinent inquiry." (Citing Greer vs. Reece et al, 14 District Reporter 658).
>
> "Our ideas of proper and fair verdicts in these cases are so drastically different from the findings of the jury, that *to grant new trials unless remittiturs were filed, would be in effect substituting verdicts of the judges for verdicts of the Jury.* Courts can and do exercise the power to correct excessive verdicts by granting a new trial unless a remittitur is filed, but when

the verdict thought proper by the Court is much less than the amount of the verdict of the jury, to *grant a new trial unless a remittitur is filed goes beyond the scaling down of a verdict, and substitutes the finding of the Court for the finding of the jury.* (Italics ours).

7. Plaintiff below thereafter discontinued both actions against the defendant, Ralph Beaver Strassburger (R. 31).

8. The cases against your petitioner were again tried before the Honorable Harold B. Knight and a jury. This trial was marked by highly prejudicial and immaterial references to an alleged investigation of Mr. Strassburger by the Federal Bureau of Investigation (R. 43), by the prejudicial and irrelevant statements of plaintiff (R. 155, 158), his counsel (R. 439), and his witnesses (R. 74), to which due exception was taken and proper motions for a mistrial made, all of which were denied by the Trial Court. Illustrative of the manner in which some of the prejudice was created against the defendant are the following extracts from the record:

By Plaintiff from the witness stand (after he had been warned by the court to exclude immaterial and prejudicial detail):

> "He (Strassburger) then went into a tirade of abuse, branding the President of the United States" (R. 158).

By Counsel for plaintiff, in his speech to the jury:

> "Nothing short of a substantial verdict for punitive damages will ever jolt this man, Strassburger, and his privately controlled corporation out of it * * *" (R. 446) (It is to be noted that at the time of trial Mr. Strassburger was not a defendant; that he was not alleged in the pleadings to have acted on behalf of your petitioner or in furtherance of its business; that any opinion he may or may not have held concerning the President of the United States was in no wise pertinent to the issues involved; that these

immaterial references to the F. B. I., and arguments made in time of war could only serve to prejudice the jury, and deprive your petitioner of a fair and impartial trial and that due process of law guaranteed under the Constitution and its Amendments.)

9. Plaintiff below did not allege that he had suffered any special damages. As to general damages in this case, the Lower Court is of record as follows:

> "There is little evidence which would support a claim for substantial general damages." (Bausewine vs. Strassburger, 50 D. & C., Pa. 525) (Appendix 22).

As to punitive damages, the trial court properly charged the Jnry that, under the Law of Pennsylvania (R. 306):

> "• • • punitive damages must bear some reasonable relation to the general or compensatory damage awarded."

10. The Jury, disregarding the evidence in the case and the charge of the Court concerning damages, rendered the following verdicts against your petitioner:

In the first case (being Common Pleas No. 36), $15,000.00.

In the second case (being Common Pleas No. 83), $35,-000.00.

11. Your petitioner thereupon duly filed its motions for new trial, alleging *inter alia* (R. 389, 391):

The verdicts were against the evidence.

The verdicts were excessive and obviously the result of prejudice, passion or sympathy.

The verdicts were contrary to the charge of the Court.

12. The Lower Court *admitted* that the verdicts were "excessive" (516a); however, although the verdicts again totalled $50,000.00, and one was $10,000.00 in excess of a former verdict in that same case, concerning which the

Court had said in its former opinion (*Bausewine* v. *Strassburger*, 50 D. & C. 525 (Appendix "A," 19):

> "The amounts of the verdicts alone, evidence that the jury must have been swayed more by prejudice and passion than a desire to fairly compensate the plaintiff or reasonably punish the defendant * * * a verdict based on passion and prejudice cannot be cured by remittitur * * * right and justice require that it be set aside and the case tried again by an impartial jury;" (Appendix 22)

the Court this time ordered remittiturs filed, totalling $37,500.00 (R. 519, 520).

13. The Lower Court in its opinion filed after the second trial, admitted that the present verdicts were inspired by prejudice and recited in justification of its refusal of new trials, only its conviction (R. 518):

> "that the jury had no *preconceived prejudice* or resentment against the corporation or its president * * * *any feeling against the defendant corporation* or its president, Mr. Strassburger, that may have existed in the minds or hearts of the jurors, was *engendered by the facts of the case as those facts were developed by the plaintiff's witnesses.*" (Italics ours.)

14. The Lower Court denied your petitioner a trial by a fair and impartial jury, as guaranteed by Section 6, Article 1 of the constitution of Pennsylvania and the Fourteenth Amendment to the Constitution of the United States, and upon the excuse that:

> "These cases have been tried twice and the same verdict has been rendered against this defendant each time * * * new trials may and probably will result in other excessive verdicts," (R. 519). "Substituted *verdicts of the judges for verdicts of the jury,*" ordered remittiturs filed, with the result that

judgments were entered against your petitioner, as follows:

As to the first case (being Common Pleas No. 36), $3,750.00.

As to the second case (being Common Pleas No. 86), $8,750.00.

15. Appeals from these judgments were duly lodged with the Supreme Court of Pennsylvania. Your petitioner there assigned as error (#14) (#16) *inter alia* (R. 537, 538):

> The action of the Lower Court in ordering the filing of remittiturs in these cases, which action constituted an abuse of judicial discretion, resulting in a deprivation of defendant's right to trial by jury. (Appellant's Brief in Sup. Ct. Pa., page 1, question 7, and argument page 79).

16. In an opinion filed (R. 545) the Supreme Court of Pennsylvania dismissed all of your petitioner's exceptions and affirmed the judgments of the Lower Court.

17. Your petitioner then filed a Petition for Re-Argument (R. 556), again respectfully calling attention to the fact that your petitioner was being deprived of its Constitutional right of trial by a fair and impartial jury, in contravention of the Fourteenth Amendment of the Constitution of the United States, and Article 1, Section 6 of the Constitution of Pennsylvania (Question raised Assignment of Error #14 and in Appellant's Brief, pages 69 to 75).

In that petition your petitioner characterized that action, as not only depriving your petitioner of its right to trial by jury, but argued that the attempted substitution of judicial discretion therefor, constituted an unwarranted judicial infringement and invasion of the freedom of the press, contrary to the guarantees contained in the Fourteenth Amendment to the Constitution of the United States, and in Article 1, Sections Six and Seven of the Constitution of the Com-

monwealth of Pennsylvania (Question raised in Appellant's Pennsylvania Supreme Court Brief, pages 51, 53 and 55).

18. The Supreme Court of Pennsylvania dismissed the Petition for a Re-hearing on April 12, 1945.

19. A Petition was then filed with the Supreme Court of Pennsylvania, praying that the Record in the case be held until your petitioner had a reasonable time in which to petition your Honorable Court for Writs of Certiorari. That Petition was allowed, and the Record is now so held.

**Federal Questions**

1. Has your petitioner been denied "due process of law" and "trial by jury," as protected by the Fourteenth Amendment, where a State Court rested its decision upon the findings of material facts implied in verdicts of an admittedly prejudiced jury; denied a new trial, but reduced verdicts in the amount of $50,000.00, by remittiturs in the amount of $37,500.00.

2. Was the action of the State Court in substituting its judicial judgment for the verdicts of an admittedly prejudiced jury, an exercise of a post-publication judicial censorship, contrary to the guarantees of a free press, as expressed in the First Amendment to the Constitution of the United States, and protected from abridgment by a state in the Fourteenth Amendment?

3. Has your petitioner been denied "due process of law," and "trial by jury," guaranteed by the Fourteenth Amendment, where a State Court, in time of war, denied defendant's motions for mis-trial, based upon highly prejudicial and immaterial references to, and arguments upon, matters improperly reflecting upon the patriotism of the president of the defendant corporation?

## Opinions

The Opinion filed by the Court below after the first trial of this case is attached hereto. It is reported in Pennsylvania, at 50 District and County Reports, 525; (Appendix "A," 519).

The opinion of the Lower Court, filed after the second trial, appears (R. 504).

The Opinion of the Supreme Court of Pennsylvania appears (R. 545). It is reported, 41 Atl. (2nd) 736.

## Origin of Federal Questions

By the nature of the first two questions involved, the federal questions could not be raised in the Lower Court, inasmuch as the denial of a trial by a fair and impartial jury, the substitution of judicial discretion therefor, and the denial of a free press, did not appear in the case until the Lower Court had filed its Opinion.

These questions were raised for the first time in the Supreme Court of Pennsylvania. The question of denial of trial by jury was raised in the Seventh Question presented to the Pennsylvania Supreme Court, under Statement of Questions Involved, and was based upon Assignment of Error No. 14, in due accord with the procedure established for appeals in Pennsylvania. This question was argued orally and upon pages 69 to 79 of Appellant's Brief there filed.

The third federal question was raised for the first time in the Lower Court in Defendant's Argument for a New Trial. It was again raised in the Supreme Court of Pennsylvania in the fifth question listed under Statement of Questions Involved. That question was raised in the Appellate Court of Pennsylvania upon Assignments of Error Nos. 5, 8 and 9.

William F. Quinlan,
*Philadelphia;*
John J. O'Connor,
*New York.*

SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1945**

---

# No. 131

---

NORRISTOWN HERALD, INC.,

*Petitioner,*

*vs.*

GEORGE BAUSEWINE,

*Respondent*

---

## BRIEF

---

### Trial by Jury in a Libel Case Is a Requisite of Due Process of Law in Pennsylvania

---

The right to trial by jury, in civil cases grounded in libel, is historic, in Pennsylvania. It was established in the early common law of Pennsylvania, and is therefore guaranteed in Article 1, Section 6 of the Constitution of Pennsylvania:

> "Trial by jury shall be as heretofore, and the right thereof remain inviolate." (Purdon's Digest, Penna. Constitution, page 108)
>
> "The purpose of the constitution (Pa.) undoubtedly was to preserve the jury trial whenever the common

law gave it * * *" (*Van Swartow* v. *Commonwealth*, 24 Pa. 131, 132 (1854))

**Your Petitioner Was Accorded the Form, But Denied the Substance of Trial by Jury**

It is conceded that the forms of trial by jury were duly accorded your petitioner. However, the substance of trial by jury has been denied your petitioner, in that, the jury which heard the case was admittedly motivated more by prejudice and passion than any desire to reach a fair and proper verdict upon the evidence.

The trial court once granted a new trial in these cases, for the reason that verdicts identical in total amount with the verdicts rendered by the present jury:

> "alone showed that the jury must have been swayed more by passion and prejudice than a desire to fairly compensate plaintiff for the injury done him, or to reasonably punish the defendants for their wrongdoing" (Appendix 22).

At that time, it concluded:

> "A verdict based on passion and prejudice should not be allowed to stand. It cannot be cured by remittitur. Right and justice require that it should be set aside and the case tried again by an impartial jury" (Citing *Atlas* v. *Fort Pitt Brewery Company*, 83 P. L. J. 421) (Appendix 23).

The Lower Court in that opinion further stated in reference to the amount of these verdicts:

> "that to grant new trials unless remittiturs were filed would be, in effect, *substituting verdicts of the judges for verdicts of the jury*" (Appendix 23).

After the second trial it did that which it precisely said it had no right to do; it "*substituted verdicts of the judges*

*for verdicts of the Jury.*" The denial of trial by jury was more flagrant after the second trial than it would have been had the Court ordered remittiturs filed after the first trial, for the reason that one of the verdicts was $10,000.00 in excess of a verdict which the Court had previously stated:

> "showed that the jury must have been more swayed by prejudice and passion than a desire to fairly compensate plaintiff * * * or to reasonably punish the defendant * * *" (Appendix 23).

This Court has held:

> "but a State Court may not by any of its agencies disregard the prohibition of the Fourteenth Amendment. Its judicial authority may keep within the letter of the statute prescribing the forms of procedure in the Courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the amendment. *In determining what is due process of law, regard must be had to substance and not to form*" (Chicago-Burlington Railroad vs. Chicago, 166 U. S. 226). (Italics ours.)

The existence of prejudice in the minds and hearts of the jury is impliedly admitted in the opinion of the Lower Court, filed after the second trial (R. 504).

> "We are convinced that the jury had *no preconceived prejudice or resentment against the defendant corporation or its president.*" (Italics ours.)
>
> "Any feeling against the defendant corporation, or its president, Mr. Strassburger, that may have existed in the minds or hearts of the jurors was, *engendered by the facts of the case, as those facts were developed by plaintiff's witnesses*" (R. 518). (Italics ours.)

It is fundamental that a party has a right to trial by a jury, which is not only free of "preconceived prejudice

or resentment" against it, but by one which remains free of prejudice and resentment, and reaches its verdict solely on the evidence.

The Supreme Court of Pennsylvania in its Opinion recites eight material issues of fact, which it holds were for the determination of the jury. (*Bausewine* v. *Norristown Herald*, 41 Atl. (2nd) 736, 741, 742) (R. 545). It finds that there were sufficient facts for the jury to conclude against the defendant, but it ignores the fact, that in the absence of "prejudice and resentment * * * in the minds and hearts of the jury," these issues might have been determined in defendant's favor.

Moreover, should it be determined that plaintiff is entitled to a verdict on the merits, such a determination would not excuse the Court, in depriving your petitioner of a trial by a fair and impartial jury:

> "and the fact that the Court's judgment may be justified on the merits, does not obviate the requirement of a fair trial. As was said in Union Pacific Railroad Co. vs. Syas, 246 Federal, 561, at page 568, '* * * But no judgment is just if not obtained by due process of law; otherwise courts could enter judgments without trial.'" (Inland Steel Company vs. N. L. R. B., 109 Federal (2nd) 9.)

This is precisely what the State Court in the present case has done. It has recognized that the present verdicts were rendered by a jury that was prejudiced and motivated by resentment. It has disallowed the damages as assessed by the jury for that reason; but motivated by expediency, it has "*substituted its verdict for that of the jury*" (R. 519), and it has assessed what it considered proper damages. This it may not do.

**State Court Denied Petitioner's Right of Trial by Jury, for Expressed Reasons of Expediency**

That the Lower Court was motivated by expediency appears clearly in its Opinion (R. 519),

> "These cases have been tried twice and the same verdict as to the amount of damages has been rendered against this defendant each time. New trials may and probably will result in other excessive verdicts."

Expediency, or convenience, or a natural desire to be rid of harassing delay did not justify the Court in depriving your petitioner of a trial by a fair and impartial jury.

> "There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when that minimal requirement has been neglected or ignored" (Inland Steel Co. vs. N. L. R. B., 109 Federal (2nd) 9).

**The Action of the State Court in Substituting Its Judgment for That of a Jury Constitutes a Post-Publication Judicial Censorship, in Contravention of the First and Fourteenth Amendments.**

To permit a Court to substitute its judgment for that of a prejudiced and partial jury in a libel case is to permit a Court not only to deprive a defendant of due process of law, but to establish itself as a judicial censor over that which may or may not be published. This would be in contravention of the constitutional guarantees of a free press (First and Fourteenth Amendments), and would permit a post-publication judicial censorship, unacceptable to American standards of a free press.

An examination of the Record clearly indicates the reasons for the prejudice that existed in the minds and hearts of the jurors. In the first place, the president of the defendant corporation bears a name of German origin.

Counsel for the plaintiff was permitted to introduce immaterial references to an alleged investigation of the president by the Federal Bureau of Investigation. These references all arose out of an alleged conversation between the plaintiff and the president of the corporation, in which conversation the president of the corporation, Mr. Strassburger, was alleged to have requested the help of the plaintiff, who was then Chief of Police of the Borough of Norristown, in learning the names of the owners of certain automobiles, the occupants of which had been harassing Mr. Strassburger. From the plaintiff's testimony, it appears that the sole purpose sought to be served by Mr. Strassburger in obtaining this information was to report it to the Federal Bureau of Investigation. The seeking of this information, and the plaintiff's refusal or inability to obtain it, was cited by plaintiff as the inspiration for the alleged malice in the publication of the articles. On the contrary, the origin of the articles was founded in the conduct of the Chief of Police toward the citizens of Norristown, who complained concerning it to the defendant newspaper. It would have been sufficient in the case for the plaintiff to have testified that he had been requested to obtain information for Mr. Strassburger, and that he refused to do so, without the introduction of the references to the alleged involvement with the Federal Bureau of Investigation. With this, plaintiff was not content, and his witnesses testified:

> "Mr. Bausewine is not going to help you out. He is going to stand by the Government. I said, 'You got yourself in a mess with the Government, you have to get yourself out of it.' " (R. 74).

This statement was neither material to the issues, nor true in fact.

And again:

By Plaintiff (from the witness stand, after he had been warned by the Trial Court to exclude prejudicial and immaterial detail):

> "He (Strassburger) then went into a tirade of abuse, branding the President of the United States" (R. 158).

This prejudice, having been brought to bear against the president of the corporation, was transferred to the corporation by counsel for the plaintiff in his speech to the Jury (R. 446):

> "Nothing short of a substantial verdict for punitive damages will ever jolt this man Strassburger, and his privately controlled corporation out of its —."

Counsel was also permitted to refer in his closing address, to Mr. Strassburger as "the real defendant in the case". (R. 439.)

It can easily be understood that in war-time, a person bearing a German name, having had introduced against the corporation of which he is president, these immaterial references to the alleged investigations by the Federal Bureau of Investigation, being accused of having gone, "into a tirade of abuse against the President of the United States," could hardly be expected to receive a fair trial at the hands of the Jury.

In conclusion, therefore, it is respectfully suggested that your petitioner has not had its day in Court. It has not had a trial by a fair and impartial jury, but before a jury that was deliberately prejudiced against the defendant by the plaintiff; that the State Courts have recognized that your petitioner did not have a fair trial, but motivated by expediency, have tried to substitute their judgments there-

for, contrary to the guarantees contained in the Constitution and in the Seventh and Fourteenth Amendments.

Your petitioner therefore prays that Writs of Certiorari be allowed to the end that new trials may ultimately be granted and justice done.

And it will ever pray.

WILLIAM F. QUINLAN.
JOHN J. O'CONNER.